UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	§	No. 5:17-CR-842-DAE
	§	
vs.	§	
	§	
REYNALDO SALINAS,	§	
	§	
Defendant.	§	

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

Before the Court is a Motion to Suppress Evidence filed by Reynaldo Salinas ("Defendant" or "Salinas") on December 26, 2018. (Dkt. # 27.) The Government filed their Response on January 11, 2019.

On January 18, 2019, the Court held a hearing on the motion. At the hearing, Daniel P. McCarthy, Esq. represented Defendant and Bettina J. Richardson, Esq., represented the Government. Two Government witnesses presented testimony. After careful consideration of the memoranda and exhibits filed in support of and in opposition to the motion, as well as the arguments and testimony advanced at the hearing, the Court—for the reasons that follow—**DENIES** Defendant's Motion to Suppress. (Dkt. # 44.)

BACKGROUND

On November 1, 2017, a federal grand jury returned a two-count indictment charging Salinas with: (1) Attempted Coercion or Enticement of a

Minor, in violation of 18 U.S.C. § 2422 (b); and (2) Attempted Transfer of Obscene Materials to Minors, in violation of 18 U.S.C. § 1470. The charges against Salinas stem from an investigation initiated by Special Agent Casey Sabin ("SA Sabin") with the Air Force Office of Special Investigations ("AFOSI") in September 2017. (Dkt. # 1 at 2.)

SA Sabin is an agent authorized to conduct Internet Crimes Against Children ("ICAC") operations. (Id.) SA Sabin created an online persona posing as a 14-year-old female named "Cassie" and posted it in a mobile application called "Whisper" on September 27, 2017. (Id.) An individual using "Whisper" responded to the post. (Id. at 3.) He exchanged messages with "Cassie" and disclosed to her that he is a mechanic for the United States Army working out of Joint Base San Antonio ("JBSA"). (Id.) Within six messages "Cassie" told him she went to school on Fort Sam Houston ("FSH"). (Id.; see also Dkt. # 47-5 at 2.) He described the sexual acts he wanted to perform with her, sent her images of his exposed erect penis and of himself in his underwear, and solicited "Cassie" numerous times for nude photographs of herself. (Dkt. # 1-2 at 3) He and "Cassie" also communicated via Google voice. (Id.) He stated that he wanted to pick "Cassie" up and engage in sexual intercourse. (Id.) According to the affidavit submitted in support of the criminal complaint, "[h]e provided sufficient

background information about his personal and professional life for AFOSI to positively identify him prior to apprehension." (Id.)

On October 20, 2017, Defendant entered Lackland Air Force Base ("LAFB") to pick up "Cassie." (Dkt. # 46 at 3.) He was detained, and after being given "statutory and constitutional warnings, Defendant admitted he had been engaged in ongoing digital conversations with 'Cassie' . . . and that he entered LAFB to pick her up and have sexual intercourse with her." (Id.)

LEGAL STANDARD

I. Suppression Under the Fourth Amendment

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . and effects against unreasonable searches and seizures, shall not be violated. . ." U.S. Const. amend. IV. Suppression of evidence is the remedy for a Fourth Amendment violation. Mapp v. Ohio, 367 U.S. 643, 648–49 (1961) (noting that evidence seized contrary to the Fourth Amendment "shall not be used at all") (citation omitted); Davis v. United States, 564 U.S. 229, 236 (2011) ("[T]he exclusionary rule is a prudential doctrine . . . created by this Court to compel respect for the constitutional guaranty" of the Fourth Amendment) (internal citations omitted).

On a motion to suppress, the defendant has "the burden of making specific factual allegations of illegality, producing evidence, and persuading the

court that evidence should be suppressed." United States v. Rockwell, No. 07-CR-128, 2007 WL 2122432, at *1 (E.D. La. July 19, 2007) (citing United States v. Evans, 572 F.2d 455, 486 (5th Cir. 1978)).

II. Suppression under Statute

While suppression is generally only a remedy to violations of the Fourth, Fifth, and Sixth Amendments, the Supreme Court has held that suppression can be appropriate for certain statutory violations. See, e.g., Sanchez-Llamas v. Oregon, 548 U.S. 331, 348–49 (2006); Miller v. United States, 357 U.S. 301, 313–14 (1958); McNabb v. United States, 318 U.S. 332, 344–45 (1943). Though those cases apply "only to statutory violations directly implicating the Fourth or Fifth Amendments . . . there is no reason why the rule should not be applied to the violation of a statute with . . . a substantial constitutional foundation." United States v. Dreyer, 804 F.3d 1266, 1283 (9th Cir. 2015) (Berzon, J. concurring).

The Fifth Circuit has specifically contemplated suppression for violations of the Posse Comitatus Act ("PCA" or "the Act"). In order for such a violation to dictate suppression, it must be part of a pattern of "widespread and repeated" violations of the Act. United States v. Mullin, 178 F.3d 334, 342 (5th Cir. 1999) (quoting United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979)).

DISCUSSION

Defendant argues that, because the "Whisper" application is used by the general civilian population and is not limited in scope to military members, the investigation by SA Sabin was an enforcement action by the United States Air Force to enforce the civilian laws of the United States against the civilian population using methods and means normally used by civilian law enforcement agencies and thus was in violation of both the Fourth Amendment and the Posse Comitatus Act. (Dkt. # 44 at 2–4.)

The Government disagrees, arguing both that the search was not unreasonable within the meaning of the Fourth Amendment and that the PCA was not violated due to SA Sabin's ability to target the investigation based on the "Whisper" application's geographic proximity data and the way SA Sabin screened those who contacted "Cassie." The Government argues that the PCA was not violated in this case because: (1) Defendant identified his connection to the Army shortly after beginning the conversation with "Cassie"; (2) "Cassie" identified her location on FSH—a military installation— and her status as a military dependent within the first few lines of the conversation; (3) and Defendant entered LAFB—a military installation—to pick her up. (Id. at 2, 4.) Salinas does not contest those facts. Rather, Defendant's argument is that the investigation began when the photo

was first posted by SA Sabin onto "Whisper" and the act of posting it contravened both the PCA and the Fourth Amendment.

I. Suppression under the Fourth Amendment

Defendant presents this claim, in part, as a Fourth Amendment issue. (See Dkt. # 44 at 3.) He argues that violations of the PCA are widespread and that other civilians are being investigated by military authorities contrary to the statutes' prohibition, and that this violates their Fourth Amendment rights. (Id.)

In order to claim a Fourth Amendment violation, a defendant must have standing: they must prove a violation of their own Fourth Amendment rights. Rakas v. Illinois, 439 U.S. 128, 134 (1978). "Since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections." Id. (internal citation omitted). "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Alderman v. United States, 394 U.S. 165, 174 (1969). Courts do not "exclude evidence against one defendant in order to protect the rights of another." Id. Further, in a suppression action, the petitioner "bears the burden of proving not only that the search . . . was illegal, but also that he had a legitimate expectation of privacy [in the place to be searched]." Salinas has provided no evidence that there was any violation of his Fourth Amendment rights,

and lacks standing to challenge the alleged PCA violations under the Fourth Amendment on behalf of other civilians. See Alderman, 394 at 174 ("The victim[s] can and very probably will object for [them]selves when and if it becomes important for him to do so.") Therefore, insofar as Salinas' motion is construed as a motion to suppress based on the Fourth Amendment, the motion is **DENIED**.

II. Suppression for PCA Violations

Salinas also argues that suppression is warranted based on the alleged statutory violation of the PCA. The PCA was originally codified in 1878 and bars the military from engaging in civilian law enforcement activities. Act of June 18, 1878, ch. 263, 20 Stat. 152 (1878). The current version of the Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385. The statute "prohibits Army and Air Force military personnel from participating in civilian law enforcement activities." Dreyer, 804 F.3d at 1272 (quoting United States v. Chon, 210 F.3d 990, 993 (9th Cir. 2000)). In order for the statute to apply, however, the targeted individual must be a civilian. See Dreyer, 804 F.3d 1266 (holding that an NCIS investigation of a civilian violated the PCA, but that the good faith exception applied); Mullin, 178 F.3d at 342

(holding that even if military police's investigation of a civilian arrestee's alleged crime violated the PCA, application of the exclusionary rule was unwarranted).

In the case upon which Defendant principally relies, United States v. Dreyer, the Ninth Circuit affirmed the district court's denial of petitioner's motion to suppress in spite of holding that the involvement in an investigation of a civilian by a Naval Criminal Investigative Service ("NCIS") agent constituted a violation of the PCA. 804 F.3d 1266, 1270–71. The Ninth Circuit declined to compel suppression "because the facts of this case do not demonstrate that suppression is needed to deter future violations." Id. at 1270.

Dreyer, like the instant case, involves an internet investigation by military law enforcement. In Dreyer, NCIS agents initiated a criminal investigation related to the distribution of child pornography on the internet. Id. They used RoundUp, a software tool developed for the ICAC task force that monitors the online distribution of known child pornography files around the world. Id. An NCIS agent located in Georgia used RoundUp to investigate computers in Washington state sharing child pornography. The agent testified later that, though RoundUp has geographic parameters, it cannot "look [only] for military service members." Id. The agent detected a computer with an Internet Protocol "IP" address that had shared several child pornography files. Id. The agent contacted NCIS's representative at the National Center for Missing and

Exploited Children and requested an administrative subpoena for the name and physical address associated with the IP address. Id. The Center forwarded the request to the FBI, the FBI sent an administrative subpoena to Comcast, and Comcast identified Dreyer. Id. at 1270–71. The agent conducted a background check, learned that Dreyer had no military affiliation, prepared a report of his investigation, and sent all relevant materials to an NCIS agent in Washington state who passed it along to the local police department. Id. at 1271. The police obtained a search warrant, executed the warrant, arrested Dreyer, and charged him with six counts of possessing depictions of minors engaged in sexually explicit conduct in violation of state law. Id.

Subsequently, a special agent with the United States Department of Homeland Security obtained a federal warrant to search Dreyer's devices and Dreyer was charged with one count of distributing child pornography and one count of possession of child pornography in violation of 18 U.S.C. §§ 2252(a), (b)(1), (a)(4)(B), and (b)(2). Id. Dreyer moved to suppress the evidence seized pursuant to both the state and federal warrants, arguing that the NCIS agent's initial search violated the PCA. Id. The district court denied the motion. Id. The Ninth Circuit affirmed. The panel held that, while the Roundup investigation "cast a net across the entire state of Washington . . . [and] include[d] countless devices that had no ties to the military" and "was not reasonably tied to military bases, military

facilities, military personnel, or military equipment," id. at 1276, suppression was unwarranted. It found that the violation was "the product of institutional error somewhere in the military's command structure, rather than intentional disregard of a statutory constraint," id. at 1280, and thus that the facts of the case "do not demonstrate a need to deter future violations by suppressing the results of [the NCIS agent's] investigation." Id. at 1281.

Dreyer is distinguishable on its facts in a number of ways from the situation before the Court. The defendant in Dreyer was a civilian with no connection to the military, and there was no allegation that any of the criminal activity occurred on a military base. Here, it is undisputed that Salinas worked as a United States Army mechanic on JBSA – Camp Bullis, Texas. (Dkts. # 1 at 3; 46 at 4.) It is also undisputed, based on testimony elicited at the hearing, that Salinas drove onto LAFB—a military installation—to pick "Cassie" up and got on base using his military-issued ID. Thus, there is evidence of a military connection here that is lacking on the facts of Dreyer. See 804 F.3d at 1276 (noting that the investigation in Dreyer was not tied to military bases, facilities, or personnel). Additionally, in Dreyer, the investigatory net was spread across the state of Washington. Here, according to SA Sabin's testimony at the hearing, the net was far smaller. According to SA Sabin, the Government only targeted those responders to the profile who were in close geographic proximity to FSH. At the

time of Defendant's initial contact with "Cassie" on "Whisper," he was four miles from "Cassie's" location at FSH. [1]

At the hearing, the Government clarified its argument that the military nexus in this case was adequately established to fulfill the PCA. The Court finds that Salinas' statement that he was a civilian mechanic working for the Army on JBSA and Salinas' entry onto LAFB using his Army-issued ID in order to pick her up for the commission of the offense create an adequate military nexus to avoid offending the prohibitions in the PCA. Salinas has not contested those underlying facts. Rather, he argues, relying on Dreyer, that the initial post on "Whisper," an

[1] The Government advanced the argument at the hearing that merely posting a "Whisper" profile from a military base creates a military nexus sufficient to satisfy the PCA, and that the fact that "Cassie" told Salinas that she lived on FSH (and was therefore, presumably, a military dependent) also satisfies the PCA. The Court notes that such a rule would defeat the spirit, if not the letter, of the PCA (enacted hundreds of years prior to invention of the Internet). The fact that the post emanates from a military base or that the poster creates a persona who is a military dependent, on their own, do not seem to satisfy the PCA. If this Court accepted the Governments argument, then the military could investigate anyone who responded to the profile posted, which would, arguably, impermissibly extend the reach of military law enforcement into the civilian law enforcement sphere. The Court, however, does not need to rule on that argument in light of Salinas' employment by the Army and the fact that Salinas actually entered a military installation to pick "Cassie" up using his military-issued ID.

application accessible via the internet by anyone in the world, regardless of military or civilian status, is, in itself, a violation of the PCA.[2]

The question Salinas' argument urges the Court to address is when an investigation that contravenes the PCA begins. Is it, as Salinas argues in his motion and contended at the hearing, when the initial photo is posted on an application that can be seen by military members and civilians alike? Or is it, as the Government contended at the hearing, when the focus narrows to a particular individual who has contacted the profile and provided some evidence of the requisite military nexus? To quote the Fifth Circuit, this Court does not have to decide that "complex and difficult issue" here. Wolffs, 594 F.2d at 85.

Though "the Supreme Court has approved of using the [exclusionary] rule to remedy statutory violations . . . in rare circumstances," Dreyer, 804 F.3d at 1279, and the Fifth Circuit has contemplated using the exclusionary rule to remedy violations of the PCA, the Fifth Circuit has also consistently required a showing beyond what is made here in order to do so. See Mullin, 178 F.3d at 342 (declining to apply the exclusionary rule, noting that it should only be applied to PCA violations only if there is evidence of widespread and repeated violations); Wolffs,

[2] Salinas also appeared to advance an argument for entrapment at the hearing. As it is not in the briefing, and it is undisputed that Salinas contacted "Cassie" first, the Court need not reach it.

594 F.2d at 85 ("If this Court should be confronted in the future with widespread and repeated violations of the Act an exclusionary rule can be fashioned at that time.").

Suppression is only warranted for a PCA violation in this Circuit for "widespread and repeated violations" of the PCA. Mullin, 178 F.3d at 342; Wolffs, 594 F.2d at 85. Salinas has not presented facts sufficient to show the widespread or repeated nature of the violation. In fact, he has presented no facts at all, only assertions that the application can and does reach many civilians. Absent any concrete evidence of that reach, or any evidence, like that in Dreyer, that civilian names have been or are being turned over to civilian law enforcement for further investigation and prosecution based on investigations begun by military authorities, there is simply not a showing sufficient to compel suppression.

CONCLUSION

Therefore, for the reasons stated, the Court **DENIES** Defendant's motion to suppress. (Dkt. # 44.)

IT IS SO ORDERED.

DATED: San Antonio, Texas, January 22, 2019.

David Alan Ezra
Senior United States Distict Judge